

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1443 CS                      Liens  
**SPONSOR(S):** Russell; Traviesa  
**TIED BILLS:** None                      **IDEN./SIM. BILLS:** SB 588

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>7 Y, 0 N, w/CS</u>	<u>Blalock</u>	<u>Bond</u>
2) <u>Local Government Council</u>	<u>8 Y, 0 N, w/CS</u>	<u>Smith</u>	<u>Hamby</u>
3) <u>Justice Council</u>	<u>10 Y, 0 N, w/CS</u>	<u>Blalock</u>	<u>De La Paz</u>
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

This bill amends lien laws to:

- Allow for the local building department to electronically deliver a summary of the Construction Lien Law to the property owner;
- Provide that a private provider performing inspection services may not perform or approve subsequent inspections until the applicant files by mail, facsimile, hand delivery, or any other means a certified copy of the recorded notice of commencement;
- Increase from \$5,000 to \$7,500 the amount of a direct contract to repair or replace an existing heating or air-conditioning system in which a Notice of Commencement need not be filed;
- Provide that an issuing authority or a building official may not require that a notice of commencement be recorded as a condition of the application, processing, or issuance of a building permit;
- Authorize authorities issuing building permits to accept permit applications electronically and require an electronic application to include a sworn electronic submission statement;
- Require that an authority responsible for issuing building permit applications, which accepts building permit applications in an electronic format, provide public Internet access to the electronic building permit applications in a searchable format;
- Provide that when notices or other documents are sent by overnight or second-day delivery, evidence of delivery may be in electronic format.
- Provide procedures for determining the effective date of the service of notice when the notice was served electronically; and
- Provide that any person, firm, or corporation that furnishes a waiver or release of lien, or other documents containing false information, commits a third degree felony.

This bill also amends a provision in the Uniform Commercial Code by extending, from June 30, 2006 until December 31, 2006, the time that a financing statement filed under current law is effective

This bill does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill amends construction lien law to both increase and decrease regulation.

### B. EFFECT OF PROPOSED CHANGES:

#### **Background**

Section 713.13, F.S., provides that the recording of a notice of commencement gives constructive notice that claims of lien may be recorded and may take priority. It does not constitute a lien, cloud, or encumbrance on real property.<sup>1</sup>

Liens for professional services and subdivision improvements attach at the time they are recorded and take priority at that time.<sup>2</sup> Liens of materialmen or laborers who are in privity with the owner and who comply with the provisions of ch. 713, F.S., attach and take priority at the time the notice of commencement is recorded. However, in the event a notice of commencement is not filed, the liens attach and take priority at the time the claim of lien is recorded.

A notice of commencement must be recorded in the clerk's office before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment. The notice must provide:

- A description of the real property;
- A general description of the improvement;
- Name and address of the owner, the owner's interest in the site of the improvement, and the name and address of the fee simple titleholder, if other than the owner;
- The name and address of the contractor;
- The name and address of the surety on the payment bond, if any, and the amount of the bond (a copy of the bond must be attached to the notice; however, if the bond is not recorded it may be used as a transfer bond under s. 713.24, F.S.);<sup>3</sup>
- The name and address of any person making a loan for the construction of the improvements; and
- The name and address of a designated person upon whom documents may be served if other than the owner.

As a pre-requisite to perfecting a lien and recording a claim of lien, all lienors who are not in privity with the owner, except laborers, must serve a notice on the owner.<sup>4</sup> A notice to the owner provides the identity of all persons that have furnished labor or materials to improve the owner's property. The notice to the owner protects the owner from double payment and establishes priority of lien.<sup>5</sup> When final payment under a direct contract is due, the contractor must provide the owner a final payment affidavit. The contractor's final payment affidavit must state that all lienors under direct

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<sup>1</sup> Section 713.13(3), F.S.

<sup>2</sup> Section 713.07, F.S.

<sup>3</sup> Section 713.13(1)(e), F.S. A transfer bond allows an owner, who has erred and not recorded the bond with the notice of commencement, to transfer liens which are recorded against the owner's property. A lien may be transferred from the real property by depositing the amount required by s. 713.24(3), F.S., with the Clerk of the Court or by filing a surety bond in that amount with the clerk.

<sup>4</sup> Section 713.06(2)(a), F.S.

<sup>5</sup> Section 713.06, F.S.

contract have been paid in full, or if not paid in full, stating the name of each lienor that has not been paid in full and the amount due. Those lienors that fail to provide a notice to the owner may lose their lien rights if the owner makes proper payments.<sup>6</sup>

After receipt of a lienor notice to the owner,<sup>7</sup> an owner must make proper payments to the lienor. Proper payment means the owner pays all lienors named in the notice directly.<sup>8</sup> Similarly, when an owner receives a contractor's final payment affidavit, the owner must make proper payments to the contractor. Owners that make these payments will have a proper payment defense against any claim of lien. The notice of commencement must state if the contract between the owner and the contractor named in the notice is for construction or improvement that takes in excess of one year. Any payments made by the owner after the expiration of the notice are considered improper payments.

## **Effect of Proposed Changes**

### Requirements for Issuing Building Permits

#### *Current Law*

Section 713.135(1), F.S., provides that when any person applies for a building permit, the authority issuing the permit is required to:

- Print on the face of each permit card a statement that the owner's failure to record a notice of commencement may result in the owner paying twice for improvements to the property;<sup>9</sup>
- Provide the applicant and the owner of the real property upon which improvements are to be constructed with a printed statement stating that the right, title, and interest of the person who has contracted for the improvement may be subject to attachment under the construction lien law. The authority must also provide the applicant with a statement from the department providing a summary of construction lien law. The authority must mail the statement to the owner;<sup>10</sup> and
- Inform each applicant who is not the person whose right, title, and interest is subject to attachment, that as a condition to the issuance of a building permit, the applicant must promise in good faith that the statement will be delivered to the person whose property is subject to attachment.

Section 713.135(1)(d), F.S., provides that a Notice of Commencement is not required in direct contracts to repair or replace an existing heating or air-conditioning system in an amount less than \$5,000.

#### *Proposed Changes*

This bill amends s. 713.135(1)(b), F.S., to allow a building permit issuing authority to deliver the construction lien law statement<sup>11</sup>, by electronic mail or other electronic format or facsimile. This bill also provides that the statement can be delivered personally to the owner or, if the owner is required to

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<sup>6</sup> Section 713.06(3)(d), F.S.

<sup>7</sup> The notice to owner must be served no later than 45 days from commencing services to the property and before the date of the owner's final payment after the contractor has furnished the required final payment affidavit. s. 713.06(2)(a), F.S.

<sup>8</sup> Section 713.06, F.S.

<sup>9</sup> Section 713.135(1)(a), F.S.

<sup>10</sup> Section 713.135(1)(b), F.S.

<sup>11</sup> Section 713.135(1)(b), F.S., provides that the "statement" states the right, title, and interest of the person who has contracted for the improvement may be subject to attachment under the Construction Lien Law. The statement must also be a summary of the Construction Lien Law and must include an explanation of the provisions of the Construction Lien Law relating to the recording, and the posting of copies, of notices of commencement and a statement encouraging the owner to record a notice of commencement and post a copy of the notice in accordance with s. 713.13, F.S.

personally appear to obtain the permit, to provide the statement to any owner making improvements to real property.

This bill amends s. 713.135 (1)(d), F.S., to provide that in addition to a building permit issuing authority, a private provider performing inspection services may not perform or approve subsequent inspections until the applicant files by mail, facsimile, hand delivery, or any other means a certified copy of the recorded notice of commencement.

This bill also amends s. 713.135(1)(d), F.S., by increasing the amount from \$5,000 to \$7,500 in direct contracts to repair or replace an existing heating or air-conditioning system in which a Notice of Commencement need not be filed.

This bill amends s. 713.135(1)(e), F.S., by providing that an issuing authority or a building official may not require that a notice of commencement be recorded as a condition of the application, processing, or issuance of a building permit. It provides that the paragraph does not modify or waive the inspection requirements set forth in the subsection.

This bill amends s. 713.135(4), F.S., to conform with the electronic mail provisions in the new s. 713.135(6)(b), F.S.

This bill amends s. 713.135(6)(b) and (c), F.S., to authorize authorities issuing building permits to accept permit applications electronically. It requires an electronic application to include a sworn electronic submission statement. This bill also requires that an authority responsible for issuing building permit applications that accepts building permit applications in an electronic format provide public Internet access to the electronic building permit applications in a searchable format.

### Procedures for Serving Notices and Other Instruments

#### *Current Law*

Section 713.18, F.S., provides that service of notices and other documents required under the Construction Lien Law must be made by actual delivery to the person to be served; or if a partnership, to one of the partners; or, if a corporation, to an officer, director, managing agent, or business agent thereof.<sup>12</sup> If service of notices by actual delivery or by mail cannot be accomplished, then posting on the premises is permitted.<sup>13</sup>

Section 713.18(1)(b), F.S., provides that notice may be sent by registered or certified mail, with postage prepaid, or by overnight or second-day delivery with evidence of delivery.<sup>14</sup> If a notice to an owner, is mailed by registered or certified mail with postage prepaid to the person to be served, within 40 days after the date the lienor first furnishes labor, services, or materials, service of that notice is effective as of the date of mailing if the person who served the notice maintains a registered or certified mail log that shows:<sup>15</sup> (1) the registered or certified mail number issued by the United States Postal Service; (2) the name and address of the person served; and (3) the date stamp of the United States Postal Service confirming the date of mailing.

#### *Proposed Changes*

This bill amends s. 713.18(1)(b), F.S., to provide that evidence of delivery of documents that are sent by overnight or second day delivery with postage paid as required under Construction Lien Law can be in electronic format.

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<sup>12</sup> Section 713.18(1)(a), F.S.

<sup>13</sup> Section 713.18(1)(c), F.S.

<sup>14</sup> Section 713.18(1)(b), F.S.

<sup>15</sup> Section 713.18(1)(b), F.S.

This bill also amends s. 713.18(1)(b), F.S., to provide that where the person who served notice maintains electronic tracking records generated through the United States Postal Service, containing the postal tracking number, the service of notice is effective as of the date of mailing, if the person shows the name and address of the person served, and verification of the date of receipt by the United States Postal Service.

#### Making or Furnishing False Statement

##### *Current Law*

Section 713.35, F.S., provides that if any person, firm, or corporation knowingly and intentionally furnishes to another person, firm, or corporation a written statement in the form of an affidavit containing false information about the payment status of subcontractors, sub-subcontractors, or suppliers in connection with the improvement of real property in this state, and that person relies on the information to his detriment, then that person is guilty of a felony of the third degree.<sup>16</sup>

##### *Proposed Changes*

The bill amends s. 713.35, F.S., by revising the list of legal documents to include a waiver or release of lien, or other document in which it is a third-degree felony to knowingly and intentionally include certain false information about the payment status of subcontractors, sub-subcontractors, or suppliers in connection with the improvement of real property.

#### Filing of Financing Statement under the UCC: Secured Transactions

##### *Proposed Changes*

This bill amends s. 679.705(3), F.S. by extending, from June 30, 2006 until December 31, 2006, the time that a financing statement filed under current law is effective.

#### C. SECTION DIRECTORY:

Section 1 amends s. 679.705, F.S. by extending the time that a financing statement filed under previous law is effective.

Section 2 amends s. 713.135, F.S., relating to the notice of commencement and applicability of a lien.

Section 3 amends s. 713.18, F.S., relating to the use of electronic mailing and other formats for serving notices, claims of lien, affidavits, and other documents required by the Construction Lien Law.

Section 4 amends s. 713.35, F.S., relating to the making or furnishing a false statement.

Section 5 provides an effective date of October 1, 2006, except as otherwise provided.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

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<sup>16</sup> Section 713.35, F.S.

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The addition of language pertaining to filing UCC financing statements in this bill could possibly be a violation of the single subject rule.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

The Civil Justice Committee adopted two amendments on March 28, 2006. The first amendment provided that evidence of delivery of service of notices, claims of lien, affidavits, and other documents required by the Construction Lien Law may be in an electronic format when notice is sent by overnight or second-day delivery. The second amendment provided procedures for determining the effective date of a service of notice when the notice was served electronically and the person who served the notice maintains electronic tracking records. The bill, as amended, was reported favorably with committee substitute.

The Council on Local Government adopted one amendment on April 5, 2006. The amendment clarifies that the electronic application is in lieu of the paper application. Without the amendment, it is possible that a building official would accept the electronic application, but then still ask for a paper application. The bill, as amended, was reported favorably with committee substitute.

The Justice Council adopted two amendments on April 18, 2006. The first amendment extended the time that a UCC financing statement filed under current law is effective. The amendment also provided that this provision is to be effective immediately upon becoming a law. The second amendment revises the effective

date of the bill to conform to language in the first amendment. The bill was then reported favorably with a committee substitute.